No. 84-1379

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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EUGENE F. DIAMOND, M.D., and
JASPER F. WILLIAMS, M.D.,
*Appellants,*

*v.*

ALLAN G. CHARLES, M.D., *et al.*,
*Appellees.*

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EUGENE F. DIAMOND, M.D., and
JASPER F. WILLIAMS, M.D.,
*Appellants,*

*v.*

THE HOPE CLINIC FOR WOMEN, LTD., *et al.*,
*Appellees.*

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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## BRIEF AMICUS CURIAE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF APPELLANTS

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## BRIEF AMICUS CURIAE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS IN SUPPORT OF APPELLANTS

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### INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a non-profit voluntary association, national in membership, organized to promote good will and har-

monious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the right to life of all, born and pre-born. To fulfill these purposes the League frequently files amicus curiae briefs in cases, such as this one, involving matters relating to abortion. The League is especially concerned with this matter because it involves the rights of women to be informed that they face abortion decisions of which they might otherwise be unaware. Information concerning the existence of decisions about abortion will help women make decisions which most correctly reflect their true conscientious and religious beliefs.

The League has obtained written permission to file this brief from the counsels of record for the parties to this matter. These letters have been filed with the Clerk of this Court.

## SUMMARY OF ARGUMENT

Sections 11(d) and 2(10) of the Illinois Abortion Law, which require disclosure of the abortifacient character of a drug or treatment, are constitutional exercises of Illinois' right to inform patients of the existence of a decision about abortion. Required disclosure of the existence of a decision about abortion cannot interfere with the right of a woman to make that decision. Indeed, disclosure facilitates intelligent decisionmaking by informing women of a decision about abortion of which they might not otherwise be aware. Thus, required disclosure of the existence of a decision about abortion, unlike some types of required disclosure concerning the "significance" of the decision, cannot violate the constitutional protection accorded abortion decisionmaking. The statutes involved in this case, properly construed, only require informing the woman of the existence of the abortion decision, and are unquestionably constitutionally valid exercises of state authority to ensure informed consent in decisions about abortion.

## ARGUMENT

This brief addresses the constitutional validity of §§ 11(d) and 2(10) of the Illinois Abortion Act,[1] which require disclosure of the abortifacient character of any drug, medicine, or instrument prescribed or administered. The court of appeals took the strange position that these provisions, designed to disclose the mere existence of a decision about abortion, burdened that decision. *See Charles v. Daley,* 749 F.2d 452, 461-462 (7th Cir. 1984). This interpretation misconstrued both the meaning of the relevant statutes and the scope of a state's authority to require disclosure of the mere existence of a decision about abortion.

### I.

### THE RIGHT INVOLVED IN ABORTION CASES IS THE RIGHT TO MAKE A DECISION ABOUT ABORTION.

*Roe v. Wade,* 410 U.S. 113, 153 (1973), guarantees women a right to make a decision whether to have an abortion. Be-

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[1] Section 11(d) sets out the disclosure requirement in the following manner:

> Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for which it is prescribed, or upon whom it is administered, that it is an abortifacient commits a Class C misdemeanor.

Section 2(10), in turn, defines "abortifacient" in the following fashion:

> "Abortifacient" means any instrument, medicine, drug or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

Ill. Rev. Stat. ch. 38, paras. 81-22, § 2(10) and 81-31, § 11(d) (1983).

cause *Roe* guarantees a right to make a decision about abortion, it protects the right to decide not to have an abortion as fully as the right to decide to have an abortion. *See Maher v. Roe,* 432 U.S. 464, 472 n.7 (1977). Accordingly, the proper constitutional test applicable to regulation of abortion at any phase in pregnancy is whether the regulation impinges on the woman's decision, in consultation with her physician, about whether or not to have an abortion. *See City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 427-431 (1983).

## II.

## A STATE MAY CONSTITUTIONALLY SAFEGUARD A WOMAN'S INFORMED CONSENT TO AN ABORTION BY ENSURING HER AWARENESS OF BOTH THE DECISION ABOUT ABORTION ITSELF AND THE SIGNIFICANCE OF THE DECISION.

In *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 65-67 (1976), this Court concluded that a state could constitutionally safeguard a woman's informed consent to abortion by requiring that women provide written consent prior to undergoing an abortion. This Court held:

> The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

*Id.* at 67.

*Danforth,* thus, clearly establishes that permissible informed consent regulation consists of ensuring awareness of both the abortion decision itself and the significance of that decision, *id.;* this awareness is ensured by giving "information to the patient as to just what would be done and as to its consequences," *id.* at 67 n.7. *Danforth's* reasoning was reaffirmed by this Court in *City of Akron v. Akron*

*Reproductive Health Care Center, Inc.*, 462 U.S. 416 (1983), in which this Court noted that the *Danforth* requirements furthered important maternal health-related concerns, *id.* at 430.

## III.

## INFORMED CONSENT PROVISIONS, SUCH AS §§ 11(d) AND 2(10) OF THE ILLINOIS ABORTION ACT, DIRECTED ONLY TO ENSURING AWARENESS OF THE DECISION ABOUT ABORTION ITSELF, RATHER THAN AWARENESS OF THE SIGNIFICANCE OF THE DECISION, DO NOT IMPINGE UPON THE RIGHT TO MAKE A DECISION ABOUT ABORTION.

If an informed consent provision merely ensures awareness of a decision about abortion itself, without touching upon the "significance" of that decision, it cannot logically or legally be held to impinge upon a decision about abortion. Indeed, informing women that a decision is to be made will actually facilitate, if not enable, a decision about abortion.

A provision designed only to ensure awareness of a decision about abortion itself cannot interfere with a woman's choice between abortion and childbirth. Making a woman aware of a decision about abortion of which she was not previously aware does not in any way impinge upon that decision about abortion. In fact, decisionmaking is aided because the woman becomes aware, perhaps for the first time, of a constitutional decision she can make.[2] If a woman was previously aware of the existence of a decision about abortion, she can hardly complain that her decision is interfered with by the state's attempts to ensure that minimal awareness.

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[2] Such information is particularly important because of the religious and moral differences many women posit between abortion and contraception. *See* Jurisdictional Statement at App. 31-67 (Affidavits of Diana Shark, Mary Christine Gaspar, and Debra Elrod Evans). These women believe abortion is the taking of life and would not use an abortifacient, although they might use artificial birth control. While moral questions are also raised by the use of artificial birth control methods, they are unquestionably different from those associated with abortion.

Unlike §§ 11(d) and 2(10) of the Illinois Abortion Act, the provisions in *Akron* were unconstitutional because they were addressed to the "significance" of the decision about abortion rather than the simple fact of the existence of a decision about abortion. *See* 462 U.S. at 444-445. The *Akron* ordinance sought to influence the decision about abortion rather than simply notify the woman that a decision was to be made. In contrast, information directed only to the fact that a decision is to be made cannot logically or legally be held to influence the making of that same decision. Accordingly, §§ 11(d) and 2(10) cannot be invalidated as impinging upon the choice between abortion and childbirth.

Similarly, merely informing a patient of an abortion decision without addressing its "significance" does not interfere with any legitimate rights associated with the exercise of a physician's medical judgment in physician-patient consultation. In *Akron* this Court stated that:

> The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion.

462 U.S. at 427. Neither of these aspects of the physician's medical judgment arises in a situation in which the state requires only that the woman be informed of the existence of an abortion decision.[3] Unless the woman knows of the decision to be made there is no "decisionmaking process" or "decision" to be interfered with. If the woman knows of the decision before she is informed, the decisionmaking process is not interfered with by a simple statement that there exists a decision to be made.

This situation again contrasts with the ordinance overturned in *Akron*, which required the physician to make certain statements regarding the "significance" of the decision

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[3] The physician, of course, has no right to conceal the fact that the woman may be undergoing an abortion.

about abortion, rather than the mere presence of a decision, irrespective of the physician's medical judgment. 462 U.S. at 444-445. The instant statutes merely require conveyance of the single most basic fact necessary to informed decision-making: that a choice exists. Accordingly, there is no interference with the physician's role in the decision about abortion.[4]

In order to avoid upholding statutes informing women of the existence of an abortion decision, the lower court construed the statutes in an inappropriate fashion. Specifically, the court read the statutes to require physicians to state that an abortifacient kills a human being.[5] Such a statement would bear on the "significance" of the decision about abor-

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[4] The Seventh Circuit's alternative rationale—that the statutes impinge upon a supposed separate contraception right—may be quickly disposed of. *See* 749 F.2d at 462. There is only one right involved in this matter: the constitutional right to privacy. *See Akron*, 462 U.S. at 426-427 (collecting cases indicating that rights to abortion and contraception spring from identical constitutional source); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (right to privacy found in contraception cases encompasses decision about abortion). When a known abortifacient is involved, the constitutional right to privacy is to be measured by standards applicable to abortion rather than contraception.

[5] The court of appeals arrived at this conclusion by a Byzantine route. The court started with another statute (ch. 38, para. 81-22(9) (1983)) which described a fetus as a human being from conception until death. 749 F.2d at 462. (The court's description was incorrect on two counts. First, this statute had described a fetus as a human being from conception until birth, not death. Second, this statute had been amended prior to the court's decision to reflect a scientific, philosophically neutral description of the fetus as an organism of the species of homo sapiens from fertilization until birth. The court ignored this amendment, although it had been called to the court's attention. Jurisdictional Statement at 21 n.5.) The court further observed that § 2(10) defines abortifacient as a drug which kills a fetus. *Id.* The court then noted that § 11(d) required patients to be informed when prescribed drugs are abortifacients. *Id.* Putting all these statutes together, the court pronounced that §§ 11(d) and 2(10) necessarily required physicians to indicate to patients that they were killing human life. *See id.*

tion,[6] and might well be impermissible as an attempt to adopt a single theory of life in the regulation of abortion. *See Akron,* 462 U.S. at 444.

However, the statutes can more reasonably be read in a fashion contrary to the court of appeals' interpretation. This reading would require only a statement that a drug or treatment is an abortifacient, and would require no additional statements concerning the significance of this fact. Indeed, the text of § 11(d) requires only a simple statement that a drug or treatment is an abortifacient. The notion that a further statement is required concerning the "significance" of this abortifacient character is neither explicit in the statutes nor necessarily implied. The court of appeals, perversely, performed gymnastic feats of statutory construction in order to create constitutional difficulties in a statute susceptible to an obvious limiting construction.

In light of the reasonableness of an interpretation which would render the involved statutes constitutional, the lower court decision appears plainly erroneous.

First, the lower court's interpretation offended norms of statutory construction rooted in federalism. Federal courts lack jurisdiction to authoritatively construe state statutes. *See Gooding v. Wilson,* 405 U.S. 518, 520 (1972). This means that a federal court should not construe statutes in a manner which raises doubts about their constitutional validity prior to state court decisions applying the statutes in a constitutionally improper manner. *See Minnesota ex rel. Pearson v. Probate Court,* 309 U.S. 270, 274 (1940). Indeed, in previous

[6] Of course this fact alone does not invalidate the statutes. *See Akron,* 462 U.S. at 446-447 (stating that required statements of risks of particular pregnancy, description of abortion procedure to be employed, general description of steps necessary for recovery and such other information that the physician believes, in the exercise of his or her judgment, to be relevant to particular decision about abortion could be permitted); *Danforth,* 428 U.S. at 67 (allowing required statement about significance of decision and furnishing information as to just what would be done and its consequences).

abortion regulation cases this Court has required federal courts to abstain from passing on the constitutional merits of statutes prior to state court interpretation, when the statutes were "susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.' " *H. L. v. Matheson,* 450 U.S. 398, 407 (1981); *Bellotti v. Baird,* 428 U.S. 132, 147 (1976) (*Bellotti I*). Clearly, the lower court exceeded and abused any authority it has to construe state statutes when it interpreted statutes readily susceptible to a constitutional interpretation, in a manner rendering them unconstitutional, prior to any opportunity for state courts to provide an appropriate limiting construction.

The lower court's construction also was erroneous because it did not accurately reflect current Illinois law. The definitional provision the court found offensive was repealed prior to the court's decision, and this fact was brought to the court's attention. Jurisdictional Statement at 21 n.5. Inexplicably, the lower court ignored this amendment. The current definitional provision could not reasonably be held to "foist" any view of life on anyone, because, even if it were required to be utilized in a physician's statement (which it is not), it would simply describe the fetus in a scientifically and philosophically neutral manner: an individual organism of the species homo sapiens from fertilization until live birth. Such a view would be consistent with any theory of life.

The lower court's construction was also improper because it completely ignored the views of state officials charged with enforcement of these statutes. Both Attorney General Hartigan and State's Attorney Daley construed the involved statutes simply to require a statement that a drug is an abortifacient, and not to require any further statement concerning the significance of the drug's abortifacient character. *See* Jurisdictional Statement at 26 n.8. When state officials charged with enforcement construe statutes in a reasonable,

constitutionally valid manner, a federal court should not arbitrarily substitute an interpretation which renders the statutes unconstitutional. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (federal court should consider any limiting construction that a state enforcement agency has proffered in evaluating a facial challenge to a state law); *Broadrick v. Oklahoma*, 413 U.S. 601, 617-18 (1973) (court should not ignore authoritative pronouncements of state board and attorney general which would render statute constitutional in determining breadth of statutory definition of political activities); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 162-63 (1971) (court should give respectful consideration to state agency's construction of statute which would render statute constitutional). Because the enforcing state officials construed the involved statutes in a reasonable, constitutionally valid manner, the lower court should have at least taken their interpretation into account, instead of ignoring this construction and substituting its own interpretation to invalidate these state statutes.

## CONCLUSION

Sections 11(d) and 2(10) of the Illinois Abortion Law, as properly construed, set forth constitutionally appropriate requirements providing for disclosure of information pertaining only to the existence of a decision about abortion. The lower court's miscontruction of the statutes inappropriately substituted an unconstitutional interpretation of state statutes for a reasonable, constitutional interpretation of the same statutes, without allowing for an authoritative construction of the statutes by a state court. The impropriety of the lower court's statutory construction is underscored by both its failure to reflect the current statutory language and its inconsistency with the interpretation of these statutes adopted by the state officials charged with their enforcement. Accordingly, §§ 11(d) and 2(10) should be up-

held, and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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